

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT LESSARD,

Appellant,

vs.

LAWRENCE E. WILSON, Warden,
California State Prison,
San Quentin, California,

Appellee.

No. 21513 ✓

APPELLEE'S BRIEF

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JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE^{1/}

On June 8, 1961, Albert Lessard was indicted by the Grand Jury of San Francisco and charged with the murder of Joseph Mazeski. After a trial by jury, he was found guilty of murder in the first degree and sentenced to death. His motion for a new trial was denied on December 28, 1961.

The California Supreme Court affirmed the trial court's decision on September 27, 1962. On December 17, 1962, Lessard petitioned that same court for a writ of habeas corpus, alleging as grounds therefor: (1) an illegal search and seizure, and (2) juror misconduct. His petition was denied without hearing on January 3, 1963.

On January 10, 1963, Lessard petitioned the United States Supreme Court for a writ of certiorari. Eight days later, Mr. Justice Douglas granted a stay of execution pending consideration of the petition. On March 25, 1963, the petition was denied and the stay of execution set aside.

On May 14, 1963, Lessard petitioned the United States District Court for a writ of habeas corpus. In addition to the search and seizure and juror misconduct grounds which had been earlier alleged in the state courts,

1. The facts of this case are well summarized in: (1) The decisions of the California Supreme Court following petitioner's automatic appeal (People v. Lessard, 58 Cal.2d 447 (1962), and with respect to his petition for writ of habeas corpus therein (In re Lessard, 62 Cal.2d 497 (1965)); (2) the opinion of the United States District Court below and (3) the records and files presently lodged with this Court herein.

he also raised three new grounds: (a) violation of his right to be present at all stages of the trial proceedings; (b) that the prosecution knowingly suppressed material evidence; and (c) that the prosecution knowingly presented perjured testimony. On May 20, 1963, the petition was denied without prejudice and a motion for a certificate of probable cause was granted. In the following appeal, and on May 23, 1963, this Court granted a stay of execution and remanded the case to the United States District Court with the accompanying order that the case was to be held until Lessard had secured a determination of the new issues raised in the appropriate state courts.

On October 1, 1963, after unsuccessfully seeking habeas corpus in the Superior Court of Marin County in July, 1963, Lessard sought habeas corpus in the California Supreme Court alleging the same five grounds. That court issued an order to show cause on December 6, 1963. Thereafter, on February 5, 1964, a reference hearing was ordered on the three new issues, with Lilburn Gibson appointed as referee. Following the reference hearing which commenced on March 23, 1964, and was completed on April 1, 1964, the findings and report of the referee were filed with the California Supreme Court on May 21, 1964.

On October 2, 1964, Lessard filed objections to the report of the referee and a supplementary memo of points

and authorities which, in addition to the previous grounds urged, for the first time alleged a violation of his rights under Escobedo v. Illinois, 378 U.S. 478 (1964); and People v. Morse, 60 Cal.2d 631 (1964).

On February 18, 1965, the California Supreme Court granted the writ of habeas corpus with respect to the penalty phase of Lessard's trial, but in all other respects affirmed the judgment. Lessard petitioned for a rehearing on March 8, 1965, which petition was denied on March 17, 1965. The subsequent proceedings on the penalty phase resulted in the reduction of petitioner's sentence to life imprisonment.

On March 22, 1965, petitioner made a motion in the United States District Court for leave to reopen the habeas corpus matter and to file a supplemental brief therein. This motion was granted on April 8, 1965.

On September 27, 1966, the United States District Court denied Lessard's petition for a writ of habeas corpus. On October 7, 1966, he petitioned for rehearing, which petition was denied on October 12, 1966; however, the court certified that there was probable cause to appeal.

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ARGUMENT

I

PETITIONER'S CONTENTION THAT THE PROSECUTION INTRODUCED EVIDENCE OBTAINED BY AN ILLEGAL SEARCH AND SEIZURE IS NOT PROPERLY BEFORE THIS COURT BECAUSE PETITIONER DELIBERATELY BY-PASSED AVAILABLE STATE REMEDIES.

It is petitioner's contention that the introduction into evidence of a shirt bearing the laundry mark "P-AL" and which was given to the police officers by petitioner's wife at her apartment, was improper because this evidence was secured by an illegal search and seizure in violation of the Fourth Amendment guarantees.

It appears plainly evident in the trial record that petitioner's counsel was fully aware that the evidence was obtained from petitioner's home on permission given by petitioner's wife. (See RT 528). Certainly these circumstances permitted an objection under People v. Cahan, 44 Cal. 2d 434 (1955), and Mapp v. Ohio, 367 U.S. 643 (1961), which latter case was decided five months prior to petitioner's November, 1961 trial.

However, at the trial not only did petitioner's counsel fail to object to the introduction of this evidence, but rather, after having gone so far as to apprise the trial court of his appreciation with respect to the importance of the circumstances under which the shirt was obtained, expressly stated that he had no objection to its receipt into evidence.

Moreover, the issue was not raised on petitioner's automatic appeal to the State Supreme Court, and therefore was not considered in their review of the trial court's judgment. See People v. Lessard, 58 Cal.2d 447 (1962).

This issue was raised for the first time by petitioner in his first petition to the California Supreme Court for a writ of habeas corpus. That court denied his petition without hearing (Crim. No. 7276, January 3, 1963). The issue was raised again in the petition filed in the United States District Court and which this Court ordered held in abeyance pending petitioner's resort to the State courts with respect to the other three new issues.

In the course of the subsequent State proceedings petitioner again raised the issue and it was finally resolved adversely to him by the California Supreme Court in In re Lessard, 62 Cal.2d 497 (1965). This issue was not resolved by an evidentiary hearing, but rather, the Supreme Court ruled that as a matter of law petitioner could not properly raise the point on habeas corpus because he not only failed to object to the evidence at the trial level but also expressly stated that there was no objection to it, and, in addition, did not raise the issue on appeal. In the alternative, the court went on to say that even if the issue were properly before it it was without merit.

Under State law, petitioner's failure to present the issue of illegal search and seizure at trial or on appeal precludes his later presentation of that issue in a state court by habeas corpus. In re Shipp, 62 Cal.2d 547 (1965); In re Dixon, 41 Cal.2d 756 (1953). In this respect, the United States Supreme Court in Mapp v. Ohio, 367 U.S. 643 659 fn. 9 (1961), said: "state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected."

Accordingly, in Nelson v. California, 346 F.2d 73 (9th Cir. 1965), this Court affirmed the District Court's denial of the petition for writ of habeas corpus without an evidentiary hearing where the defendant has deliberately bypassed the orderly procedure of the state courts and in so doing has thereby forfeited his state remedies. This Court held that a determination by trial counsel not to object to the introduction of evidence allegedly obtained as the result of an illegal search and seizure, precludes the defendant from later raising that same issue in a federal habeas corpus proceeding. See also Fay v. Noia, 372 U.S. 391, 438-440 (1963); Henry v. Mississippi, 379 U.S. 443 (1965); Choate v. Wilson, 363 F.2d 543, 544 (9th Cir. 1966); Herrera v. Wilson, 364 F.2d 798, 800 (9th Cir. 1966); Kuhl v. United States, 370 F.2d 20, 27, 29 (9th Cir. 1966); and Rhay v. Browder, 342 F.2d 345, 348 (9th Cir. 1965).

Because the record below clearly reflects that not only did petitioner fail to object at the trial to the introduction of the evidence, but rather shows that his counsel expressly stated that he had no objection to the evidence and further, did not raise the issue on appeal from that judgment, we respectfully submit that the only conclusion permissible from such a record is that petitioner has deliberately by-passed state procedure, thereby foreclosing any consideration by this Court with respect to the merits of that issue. We further submit that Nelson v. California, supra, is directly in point and controlling.

II

PETITIONER'S ALLEGATIONS THAT: (1) THE JURORS AT HIS TRIAL WERE GUILTY OF MISCONDUCT AND BIAS; (2) THAT HE WAS DEPRIVED OF HIS RIGHT TO BE PRESENT AT ALL STAGES OF HIS TRIAL; (3) THAT THE PROSECUTION KNOWINGLY SUPPRESSED MATERIAL EVIDENCE; (4) THAT THE PROSECUTION KNOWINGLY USED PERJURED TESTIMONY; ARE WITHOUT MERIT BECAUSE THESE ISSUES WERE RESOLVED ADVERSELY TO HIM AFTER FULL AND FAIR HEARINGS ON THEM BY THE STATE COURTS WHICH ACTED PURSUANT TO PROPER CONSTITUTIONAL STANDARDS

Petitioner's allegation that the jurors at his trial were guilty of misconduct and bias is based upon the averments in the affidavit of Bernice Mayerhofer, a juror whom the court discharged before the case was submitted to the jury. However, the trial court ruled against petitioner on this issue and rested its decision upon the affidavit of the jury's foreman, which affidavit directly contradicted

the allegations presented in the Mayerhofer affidavit. The California Supreme Court in People v. Lessard, supra, also carefully analyzed and adjudicated this issue. And, in In re Lessard, supra, the court again held the point to be without merit. Accordingly, we respectfully submit that the record reflects that issues of both law and fact were fully and fairly resolved by the state courts in accordance with the federal standards for due process of law. Townsend v. Sain, 372 U.S. 293 (1963).

Petitioner's contentions that he was deprived of his right to be present at all stages of his trial and further prejudiced by perjured testimony and the suppression of material evidence, were ordered submitted to a referee for independent findings thereon. After conducting a thorough and exhaustive evidentiary hearing on these issues, the referee submitted his report to the California Supreme Court and therein found against petitioner on each of the questions presented. The California Supreme Court, relying primarily upon these findings of the referee, also ruled against petitioner on all three issues. Thus, here again the record below clearly demonstrates that these questions were fully and fairly resolved by the State Court in accordance with federal standards for due process of law. Townsend v. Sain, supra. We therefore respectfully submit that the United States District Court's decision below on these issues was correct and must be affirmed.

III

PETITIONER'S CONVICTION WAS NOT OBTAINED IN VIOLATION OF HIS RIGHT TO COUNSEL

Petitioner contends that his right to counsel and right to remain silent as established in Escobedo v. Illinois, 378 U.S. 478 (1964), were abridged when the prosecution introduced into evidence a statement of petitioner taken at the time he was a prisoner in a federal penitentiary.

It is now clear that the rules laid down in Escobedo are not to be applied retroactively. Johnson v. New Jersey, 384 U.S. 719 (1966). Since petitioner's conviction became final in 1962, we submit that he may not now attack it on such grounds.

Although petitioner seeks to avoid the effect of Johnson v. New Jersey, supra, with the argument that "final judgment" (AOB 51) in his case did not occur until 1965 (because it was not until then that the penalty phase was resolved), such a contention is clearly devoid of merit. We submit that the definition of finality set forth in Linkletter v. Walker, 381 U.S. 618 (1965), is controlling: "By final, we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed" fn. 5, p. 622, Id. As Lessard did not petition for a writ of certiorari from the judgment of conviction, we submit that

the later proceedings with respect to the penalty phase of his trial had no effect on the finality of the guilt determination, and therefore, for Escobedo purposes, the decision became final in 1962. (See also In re Lessard, supra, 512, wherein the California Supreme Court ruled the decision final in 1962.)

We therefore respectfully submit that the lower court properly precluded petitioner from raising this issue.

CONCLUSION

For the reasons stated, the order of the District Court denying appellant's petition for writ of habeas corpus should be affirmed.

DATED: June 19, 1967

THOMAS C. LYNCH, Attorney General
of the State of California

EDWARD P. O'BRIEN
Deputy Attorney General


DON JACOBSON

Deputy Attorney General

DJ:cmw
CR SF
63-196

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: San Francisco, California

June 19, 1967

A handwritten signature in dark ink, appearing to read "Don Jacobson". The signature is fluid and cursive, with the first name "Don" being more prominent than the last name "Jacobson".

DON JACOBSON

Deputy Attorney General
of the State of California

